IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 3RD DECEMBER 2007 / 12TH AGRAHAYANA 1929

SA.No. 282 of 1999(A)

AS.99/1994 of PRL.SUB COURT, KOZHIKODE
OS.70/1990 of ADDL.M.C.,KOZHIKODE-II
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APPELLANT:

KOZHIKODAN ABDUL JALEEL SIDDHIQUE,
S/O ABDUL JALEEL, AGED 44 YEARS,
KURIYEDATHU PARAMBU,
P.O. PANNYANKARA, KOZHIKODE.

BY ADV. SMT.R.BINDU

RESPONDENT:

KARINBANASSERY PARAMBIL MOOSAKOYA,
AGED 49 YEARS, S/O ABU, BUSINESS,
KURUMADAM PARAMBA P.O., PANNIYANKARA,
KOZHIKODE.

BY ADV. SMT.PREETHY KARUNAKARAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 03/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SA.No. 282 of 1999

ORDER ON C.M.P.791/1999

DISMISSED

3.12.2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

(TRUE COPY)

P.A TO JUDGE

M.SASIDHARAN NAMBIAR, J

S.A.282/1999

Dated this the 3rd day of December, 2007

JUDGMENT

Defendant in O.S.No.70/90 on the file of the Additional Munsiff Court, Kozhikode, is the appellant. Respondent is the plaintiff. Respondent is seeking a decree for recovery of possession of the plaint schedule property on the strength of title and for mandatory injunction demolishing the compound wall. Respondent claimed that he has title to the plaint A schedule property under Exts.A1 and A2 and appellant has no right over any portion of that property. It was alleged that appellant purchased the property lying on the northern side on 19.12.1989 under Ext. B1 and thereafter, demolished the mud wall which originally separated plaint A schedule property from the remaining property and constructed a new compound wall encroaching plaint B schedule property which forms part of plaint B schedule property and respondent is entitled to recover possession of the same with main profits.

2. Appellant resisted suit contending that respondent has no title to the plaint B schedule property and it does not form part of the plaint A schedule property of the respondent and the document was fabricated by the respondent to claim right over the disputed property and the assignor of respondent, had no right to the disputed property and so respondent is not entitled to the decree for recovery of possession sought for. It was contended that on the southern side of the property of the respondent, there is a public line and it was widened taking two feet width of land from the property of respondent and respondent is claiming that much property from the property of appellant and he has no right to do so.

3. Learned Munsiff on the evidence of PW1, DW1, Exts.A1 to A4, B1 to B3 and C1 to C3, found that plaint B schedule property is part of the plaint A schedule property and respondent has title to that property under Exts.A1 and A2 and appellant is not entitled to claim that property under Exts.B1 and respondent is

therefore, entitled to the decree for recovery of possession. Appellant challenged the judgment before Sub Court, Kozhikode, in A.S.99/94. Learned Sub Judge on re-appreciation of evidence, confirmed the finding of learned Munsiff and dismissed the appeal. It is challenged in the Second Appeal.

4. Though urgent notice was ordered in the Second Appeal, it was not admitted and no substantial question of law was formulated. Hence learned counsel for the appellant and respondent were heard.

5. Argument of learned counsel appearing for the appellant is that though respondent is entitled to the property covered under Exts.A1 and A2, plaint B schedule property does not form part of plaint A schedule property and plaint B schedule property forms part of the property belonging to the appellant under Ext.B1. It was argued that for the shortage of the area covered under Exts.A1 and A2, respondent is not entitled to claim plaint B schedule property and the

additional area available to the appellant is not because he encroached into plaint A schedule property but he encroached upon the corporation lane and therefore, respondent is not entitled to decree sought for.

6. Learned counsel for the respondent argued that question whether plaint B schedule property forms part of the property covered under Exts.A1 and A2 was concurrently found in favour of the respondent and that finding of fact cannot be challenged in the Second Appeal. It was argued that when Exts.A1 and A2 establish that respondent has title to plaint B schedule property and appellant trespassed into plaint B schedule property in 1989, respondent is entitled to the decree granted by the trial Court.

7. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. Respondent is claiming title to the plaint B schedule property on the basis that it forms part of the plaint A schedule property and plaint A schedule property is the

property covered under Exts.A1 and A2. Respondent is claiming title to the property, under Ext.B1. A Commissioner was appointed and Commissioner submitted Exts.C1 and C3 reports. He identified plaint B schedule property as part of the plaint A schedule property and plaint A property as the property covered under Exts.A1 and A2. Though learned counsel appearing for appellant disputed the correctness of the identification, it is a finding of fact. The trial Court on the evidence found that the objection raised to the identification made by the Commissioner is not sustainable and the disputed plot B namely plot C D E F is part of the plaint A schedule property covered under Ext.A1 and not part of the property covered under Ext.B1. First appellate Court, on re-appreciation of evidence confirmed that finding. Finding of fact by First Appellate Court is final. It cannot be interfered in exercise of the powers of this court under Section 100 of the Code of Civil Procedure. If that be so, it can only be found that respondent has title to A schedule property under Exts.A1 and A2 and plaint B schedule property is

part of plaint A schedule property and it is not part of the property covered under Ext.B1 title deed of appellant. In such circumstances, respondent is entitled to the decree sought for. Appeal is only to be dismissed. I do so.

8. Learned counsel for the appellant then submitted that compound wall was constructed under Ext.B2 plan spending huge amount and appellant may be granted two weeks time to remove the compound wall at his expense. In view of the submission, appellant is granted time till 3.1.2008, to remove the compound wall and to surrender plaint B schedule property provided appellant files an affidavit before the executing authority on or before 10.12.2007, unconditionally undertaking to remove the compound wall at his expense and surrender vacant possession of plaint B schedule property on or before 3.1.2008.

M.SASIDHARAN NAMBIAR
Judge

mrcs